Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-109

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ANDREW DELUCCHI and DOROTHY G. S. DELUCCHI,
Appellants,

VS.

THE COUNTY OF SANTA CRUZ and
THE CALIFORNIA COASTAL COMMISSION,
Appellees.

REPLY BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF THE COUNTY OF SANTA CRUZ TO DISMISS OR AFFIRM AND TO DENY THE APPLICATION FOR WRIT OF CERTIORARI

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NOW COME Appellants, Andrew Delucchi and Dorothy G. S. Delucchi and they hereby file a Reply Brief In Opposition to the Motion To Dismiss Or Affirm Or to Deny the Application for Writ of Certiorari filed by the County of Santa Cruz. Earlier, the California Coastal Commission, Appellee, filed a similar Motion, to which the Appellants have already filed a Reply Brief In Opposition. This Court is referred to the earlier Reply Brief, also.

I

THERE ARE SUBSTANTIAL FEDERAL QUESTIONS AND THERE ARE SPECIAL IMPORTANT REASONS FOR A REVIEW OF THIS MATTER

The County of Santa Cruz, referred herein to as County, makes various assertions and arguments, all of which are erroneous. There are substantial federal questions and, further, there are special and important reasons why this Court should review this matter.

Generally, the self-serving arguments of the County are: (1) the *only* alleged consideration to the farmer in entering the contract was potential tax reduction and agricultural land uses were irrelevant, although the unrefuted evidence is to the contrary; (2) notwithstanding the fact that many of the permitted land uses and discretionary land uses have been completely eliminated by the recent, substantial changes in the Agricultural Preserve Zone, according to the County there are mythical administrative processes; and (3) the Land Conservation Act contract of this farmer is merely a parochial matter, notwithstanding the enabling state legislation, statements of the trier of fact to the contrary, and the contrary statement of the California Farm Bureau. All of the County's arguments are inaccurate and not dispositive. Probable jurisdiction should be noted or, under the Writ process, the Writ granted.

1. The Represented And Assured Land Uses Under The Then Agricultural Preserve Zone Were Not Only Inducement To Enter The Contract But Were The Primary Contractual Consideration To The Farmer

For approximately three years prior to the entry of this Land Conservation Act contract with the County, Delucchis had many meetings with County officials including the County Planning Director and Assessor. Appendix A, A 4-7; A 9-10; R.T. 23-29, 42. Although the tax phase was gone into by the Delucchis with the County officials, the most important aspect to the Delucchis and that which was a primary bargained for consideration was the land uses. Appendix A 4-10; R.T. 23-29, 42-47 and 69. There were specific discussions with the County officials wherein the Delucchis were assured and promised, should they enter into this contract, they could use their land, as a matter of right, for, inter alia, family homes and greenhouses as a part of the contract and, further, the then Agricultural Preserve (A-P) Zone, including the land uses permitted as a matter of right thereunder, would remain unchanged during the life of the contract. A-10; R.T. 23-29 and 47. The Delucchis, to their substantial detriment, reasonably and irreversibly relied upon these promises, inducements and representations so as to change their position and enter into this contract with the County. A 9-16; R.T. 27, 47, and 69. Had these assurances, inducements and representations not been made to the Delucchis on behalf of the County, the farmer would never have entered into this contract. A 9-10; A 15-16; R.T. 27, 29, 48. Moreover, had the assured land uses merely been "*possible*" land uses because of a requirement to apply for a discretionary permit, the Delucchis would never have entered into this contract. A 9-10; R.T. 27-29.

The contract was drafted by the County and, thereafter, signed by Delucchis in February, 1971.[1] A-44. The contract specifically refers to the Agricultural Preserve (A-P) Zone District five times and required that the land be rezoned to the A-P Zone, which it

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[1] In the Reply Brief to the Coastal Commission Motion To Dismiss, the date was erroneously referred to as "1981"; nevertheless, the date is February, 1971. See page 3 of the Reply Brief of Delucchi.

was. Furthermore, prior to this contract, the land use General Plan adopted by the County for this land called for a relatively intense residential-golf course development of the subject property. After the contract was executed, the land was rezoned to the A-P Zone and the General Plan was amended whereby those land uses were eliminated, totally. A-13; R.T. 84-85. Failure to protect the constitutional rights of the Delucchis damaged them in excess of $2,000,000.00. A 9-13; R.T. 58, 84-85. Thus, it is clear that the guaranteed and promised land uses were, unrefutably, a primary consideration and that which was bargained for by the landowner prior to entering into this contract with the County. The erroneous assertions of the County that the potential tax reduction was the *only* consideration just have no basis.

The cases cited by the County are not dispositive in that, inter alia, none of the cases state that the "only" consideration to the farmer is a potential reduction in taxes. Furthermore, the County is bound by its own restrictions in the form of the contract and the A-P Zone including the permitted uses at the time of the contract. Otherwise, the County could unilaterally change the contract, which is not only contrary to contract law, but also is contrary to the Land Conservation Act itself. Sections 51253 and 51254 of the California Government Code; Jurisdictional Statement page 6; *Lewis v. City of Hayward,* (1986) 177 C.A. 3d 103; 222 Cal. Rptr. 781, 783.

Furthermore, as a matter of common sense, no farmer in his right mind would enter into a long term agricultural contract of this nature without wanting assurances that the agricultural land uses potentially suitable for that land are guaranteed. This is *not* a mere zoning or land use case. A farmer is in the agriculture industry, which industry is essential to the Nation. Further, the Land Conservation Act defines "agricultural use" in expansive language, i.e. "the use of land for the purpose of producing an agricultural commodity for commercial purposes" and " 'agricultural commodity' means any and all plant and animal products produced in this state for commercial purposes." *Section 51201 (a) (b) of the California Government Code.* The A-P Zone existant at the time of the inception of this contract and incorporated into it mirrors the state legislation (then and now) by

authorizing, as a matter of right, "*all* agricultural uses" as permitted uses except for the few listed discretionary use such as hog farms. A 19-22. The counter argument of the County is that if any agricultural land use is allowed the impairment is inconsequential. The County's argument is specious. For example, tree orchards are an agricultural land use but not economically feasible on many lands, including this property, in the United States. The agricultural land uses must be matched with the nature of the agricultural land, and the then prevalent market conditions and every farmer knows this. The County, self servingly, has blithely ignored these facts.

In another feeble argument, the County attempts to assert that the consideration bargained for of agriculture uses, as a matter of right, lasted only ten years. See County Motion To Dismiss, page 13. Again, the County's argument is specious. As it well knows, the life of the contract including that which is bargained for lasts ten years *beyond* a notice of termination. Government Code Section 51244. No such notice has been given and the bargained for consideration lasts throughout the life of the contract. Furthermore, the inducement by the County to Delucchis to enter into this contract lasts far beyond the contract in that, inter alia, the land use General Plan specifically authorizing an intense residential golf course development was eliminated and the property was rezoned to the A-P Zone as called for by this contract. A 9-13; R.T. 84-85.

2. The Mythical Administrative Remedies Asserted By The County Miss The Mark

Initially, the County argues, erroneously, that the case of *Penn Central Transportation Co. v. New York City*, (1978) 438 U.S. 1104, 57 L. Ed.2d 631, 98 S. Ct. 2646 deals with a contract between a public agency and a landowner and that, according to the County, the elimination of rights in a government contract by making the same discretionary with that contracting agency is constitutionally permissible. See County Motion To Dismiss, page 13. Penn Central is not dispositive in that, inter alia, the Court was not reviewing a contract authorized by state statute between the public agency, itself, and the landowner. Again, the County has missed the mark. As pointed out in the Jurisdictional

Statement, there has been a substantial impairment, contrary to the federal constitution. Jurisdictional Statement pages 12-14. Moreover, as this Court has stated, there is a strict standard that applied against a public agency when the contract in question is etween the public agency and the landowner. *Energy Reserves Group v. Kansas Power And Light Co.,* (1983) 459 U.S. 400, 412, 103 S. Ct. 697.

The County totally ignores the fact that there is, indeed, a contract between the public agency and the farmer. Rather, the County treats this as a mere "down zoning case", which it is not.

Furthermore, the County cites the case of *National Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railway Co.,* (1985) 470 U.S. ____, 106 S. Ct. 1441. See County's Motion To Dismiss, pages 12 and 13. In that case, this Court was concerned as to whether there was even a contract between the public agency, the United States, and the private companies. Nevertheless, in this case, pursuant to state authorization there is, indeed, a written contract between the public agency and the farmer. A 44-47. Furthermore, the contract, itself, repeatedly refers to the then Agricultural (A-P) Zone; that the subject property must be rezoned to the then A-P Zone; and that, inter alia, the County agrees to authorize uses permitted by the County Zoning Ordinance in the Agricultural (A-P) Zone as it existed at the time of the contract. See A 44-47 including clause 3 at A-45. If anything, the cases cited by the County, including the National Railroad Passenger Corporation case, support the position of Appellants in that the same clearly acknowledge a public agency is empowered to enter into contracts and that the contracts are enforceable under a strict standard of review as against the public agency. *National Railroad Passenger v. Atchison, Topeka and Santa Fe Railway Co.,* (1985) 105 S. Ct. 1441, 1452; *Energy Reserves Group v. Kansas Power And Light,* (1983) Supra.

Next, in desperation, the County is now waiving the mythical flag of purported administrative remedies. County has, again, missed the point. The guaranties are enforceable under the Constitution as well as by contract, all of which arose prior to 1972. For example, included within the contract was the Agricultural Preserve Zone District. Furthermore, there were induce-

ments and assurances that there would be no modification of those regulations during the life of the contract. R.T. 22-29, 42-49, 87. The then Agricultural Preserve Zone District provided landowners with many permitted uses, as a matter of right, without seeking a discretionary permit, including but not limited to family homes and almost all agricultural uses including greenhouses. A 19-24; A 13. Furthermore, the state legislature specifically provided that contracts such as this are enforceable by the landowner. *Section 51251 of the Government Code.* Although there was no administrative remedy nor is there now, assuming arguendo that one existed, no exhaustion is required since there is a right to bring this matter into court as provided by statute. *City of Susanville v. Hess,* (1955) 45 C.2d 684, 689. Moreover, this case was also brought under the federal Civil Rights Act and this Court has ruled that there is no requirement of exhaustion of so called state administrative remedies. *Patsy Regents Of The State Of Florida,* (1982) 457 U.S. 496, 102 S. Ct. 255.

Even aside from the above, the uses permitted, as a matter of right, in the Agricultural Preserve Zone District regulation in effect at the time of the execution of this contract were much more expansive and greater in number than the comparatively few permitted uses in the present A-P Zone regulation of the County. A-15. Furthermore, even if the County's present Agricultural Preserve Zone District regulations allowed an application to be filed for the same uses that were allowed, as a matter of right without any application, in the initial A-P Zone District in effect at the time of this contract, no reasonable comparison between the two can be made. Among other items, a permitted use, as a matter of right, is a right of a landowner and NOT discretionary with the public agency. A-16. Also, a "discretionary permit approval" can impose conditions and restrictions that otherwise could not be imposed on a use permitted as a matter of right. Further, the County's present Agricultural Preserve Zone District Regulations, even assuming that a "discretionary permit approval" had been obtained, are more restrictive than the uses permitted, as a matter of right, to landowner in the Agricultural Preserve Zone District regulations in effect when this Land Conservation Act was executed. A-16. Moreover, prior to the execution of the contract between the farmer and the agency, had

the assured land uses permitted as a matter of right, merely been "possible" because of a requirement to apply for a discretionary permit, the Delucchis would never have entered into this contract. A 9-10; A 15-16; R.T. 27, 47, 69.[2] Clearly, that which was bargained for by the landowner has not only been substantially impaired but eliminated. This is particularly highlighted by the

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[2] County mistakenly argues that, since a Mr. Antonelli in 1980 applied for a permit to construct greenhouses, in some manner the constitutional rights of the Delucchis have vanished. County Motion To Dismiss, pages 4-5.

Initially, the Delucchis have always been on record that greenhouses have been permitted as a matter of right and, further, the County Ordinance specifically states that "all agricultural uses" are permitted as a matter of right under the A-P Zone existent at the time of inception of this contract, except for those listed as conditional uses. A-19. Greenhouses, an agricultural use, are *not* listed as a conditional use and, therefore, were permitted as a matter of right under the, then, A-P Zone. A 19-20. Third, before, during and subsequent to the Antonelli permit, Delucchis have always been on record that greenhouses are a permitted use and no waiver of their rights has been made. Trial Exhibit 1, R.T. 51; Appendix 3. Fourth, as admitted by the County, Mr. Antonelli did not accept nor exercise a permit because the multiple conditions were burdensome and, therefore, the County has highlighted, clearly, that there is a significant and substantial impairment. Also, what the County says in 1980, or for that matter, 1986 is totally irrelevant in view of the inducements, representations and substantial change in position that occurred in 1971.

Next, the County slights the Delucchis for obtaining permits for two family homes on the property of 163 acres. Nevertheless the County carefully omits to point out that the repeal of the text of the original Agricultural Preserve Zone District (A-P) regulations, that existed at the time of the inception of the contract, did *not* become effective law until *after* the last application was filed and issued. C.T. 177-178. Further, as the records bear out at the time of the second application, the Coastal Commission staff report for the second application notes that the then *proposed* Local Coastal Plan (LCP) would require a use permit for the second unit; however, since the original A-P Zone existed at that time, no permit was required. R.T. 177-178 (Staff Report 10-21-82). Now, this has all been dramatically changed and *no* homes, as a matter of right, are permitted on this property.

fact that, shortly after the execution of the contract, the property was rezoned to A-P and the then land use General Plan calling for residential—golf course development at that time was amended to agricultural, all to the substantial detriment to the landowner. A-13. Had the landowner been told, prior to the contract, that a discretionary permit would have to be sought and obtained for family homes and greenhouses, the Delucchis would never have changed their position and would never have entered this contract. R.T. 28-29; A 15-16.

3. There Are Special And Important Reasons For Reviewing This Matter

County, whimsically, argues that, because there are only approximately four contracts in its jurisdiction of this exact nature, this has no significant impact. Yet, the County ignores the obvious. There are many Land Conservation Acts contracts throughout the state and the Decision of State Appellate Court severely impacts such contracts and the agriculture industry in general. A 14; A 42-43. The County has ignored the fact that the agricultural industry is of nationwide significance. Section 51220 (a) of the California Government Code. The County has ignored the fact that the California Farm Bureau Federation, representing 100,000 member farm families in 56 counties in California has clearly pointed out that this case "... will have an impact on present and future Williamson Act Contracts throughout the State of California." A 42-43. The County has blithely ignored the determination of the trier of fact, the Superior Court, pointing out that:

> "Most landowners would have significant reluctance to sign any long term contract, such as a Williamson Act Contract, unless he/she was assured that the land use regulations during the term of the contract would remain the same. Among other items, the landowner cannot weigh the various considerations in a Williamson Act Contract unless the zoning, zoning regulations, and text including the permitted uses thereunder remain the same and are known during the life of the proposed contract." A-14.

Clearly, there are special and important reasons for reviewing this matter.

II

CONCLUSION

The Motion of the County should be denied. The issues presented herein are critical and this Court's guidance, direction, and protection are needed not only by Appellants but also by the farmers/landowners of California and other agriculture states. Delucchis pray that probable jurisdiction be noted or that this Court grant the Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 2103 and Rules of this Court, 17.1 (a), (b) and (c).

Dated: September 18, 1986.

Respectfully submitted,

DENNIS J. KEHOE